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No. 80-1555
IN THE

Supreme Court of the United States

October Term, 1980.

LEE LINTON, SORKIS J. WEBBE, FRED L. KENNEDY, ROBERT C. TINDELL, ALADDIN HOTEL CORPORATION, and DENNIS PIOTROWSKI,

Petitioners,

vs.

UNITED STATES OF AMERICA, DEL E. WEBB CORPORATION, and JAMES R. COMER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI BY RESPONDENTS DEL E. WEBB CORPORATION AND JAMES R. COMER.

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Pursuant to Rules 19.4 and 19.6 of the Rules of the Supreme Court of the United States, respondents Del E. Webb Corporation and James R. Comer hereby declare that they have an interest in the Petition for Writ of Certiorari filed herein identical to that of the petitioners, and join in that Petition, specifically requesting that, if the Petition is granted, these respondents be permitted to file briefs on the merits in support of petitioners' position.

These respondents are codefendants with petitioners, under a Grand Jury indictment now pending in the United States District Court for the District of Nevada. These

respondents are also parties to the order of the United States Court of Appeals for the Ninth Circuit sought to be reviewed, and review of that order would directly affect these respondents, who are in the same position as petitioners with respect to that order.

In the District Court, these respondents moved to dismiss the Indictment upon two grounds. First, they argued that the Government prosecutor's deliberate deception of the indicting Grand Jury, including his false representation that the conclusory testimony of Government agents as to their guilt constituted a "complete factual summary" of lengthy proceedings before prior Grand Juries, unfairly prejudiced the indicting Grand Jury against these respondents, violating their Fifth Amendment right to be tried only upon a valid indictment returned by a fair and unbiased Grand Jury. *Costello v. United States*, 350 U.S. 359 (1956). See *United States v. Serubo*, 605 F.2d 807, 814-819 (3d Cir. 1979); *United States v. Gold*, 470 F.Supp. 1336, 1345-1346 (N.D. Ill. 1979); *cf. United States v. Samango*, 607 F.2d 877 (9th Cir. 1979).

Second, these respondents argued that the prosecutor's lengthy, substantive commentary, including numerous false statements of material fact unsupported by testimony or evidence before the indicting Grand Jury, together with his knowing reliance upon material false testimony by Government agents before the indicting Grand Jury, violated their Fifth Amendment right to due process of law. *Cf. Miller v. Pate*, 386 U.S. 1 (1967); *Napue v. Illinois*, 360 U.S. 264 (1959); *Mesarosh v. United States*, 352 U.S. 1 (1956). See *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974); *United States v. Goldman*, 451 F.Supp. 518 (S.D.N.Y. 1978). Subsequently, petitioners also moved to dismiss the Indictment, claiming similar prejudicial violations of their

rights under the Fifth Amendment to the United States Constitution.

The District Court denied these dismissal motions in a single order. Petitioners and these respondents timely noticed interlocutory appeals, under the "collateral order" doctrine as articulated by this Court in *Abney v. United States,* 431 U.S. 651 (1977), and applied in *Helstoski v. Meanor,* 442 U.S. 500 (1979). Again in a single order, the Ninth Circuit summarily dismissed these consolidated appeals for lack of jurisdiction, referencing nothing more than its nearly contemporaneous decision in *United States v. Garner,* 632 F.2d 758 (9th Cir. 1980), *cert. denied* ... U.S. ... (1981), refusing to entertain such appeals "primarily upon pragmatic considerations," because allowance of such appeals "would bring about a disruption of the efficiency of the criminal justice system that we are unwilling to countenance." 632 F.2d at 765, 766.

Simply stated, these respondents support the position of petitioners herein because meaningful review of the important Fifth Amendment guarantees against being "held to answer" in the absence of fair and unbiased Grand Jury proceedings including due process of law, should not be summarily denied in a blind, misguided quest for efficiency in the criminal justice system. In *Helstoski,* this Court held that a defendant claiming that the proceedings against him violated his right to be tried only upon the valid indictment of a Grand Jury, not only could have, but should have, obtained review of his claim by interlocutory appeal. 442 U.S. at 505-506. These respondents are in the same position here, because of their Fifth Amendment right to an indictment returned by a fair and unbiased Grand Jury. *Costello v. United States, supra.*

In *Helstoski,* this Court also held that a defendant challenging his indictment because the indicting Grand Jury

heard evidence of his legislative acts in violation of the Speech or Debate Clause, not only could have, but should have, obtained review of his claim by interlocutory appeal. 442 U.S. at 505-506. Again, these respondents are in an analogous position, because of their claim that the Government's deliberate false statements and material false testimony before the indicting Grand Jury violated the equally important guarantees of the Due Process Clause. *United States v. Basurto, supra.*

In the same sense as this Court recognized in *Abney,* these protections embodied in the Fifth Amendment against hasty, malicious, oppressive and unfounded Government prosecutions, *Branzburg v. Hayes,* 408 U.S. 665, 686-688 (1972); *Stirone v. United States,* 361 U.S. 212 (1960), would be "significantly undermined" if appellate review were postponed until after conviction and sentence. If the Fifth Amendment is to guarantee that one will not be forced "to endure the personal strain, public embarrassment, and expense of a criminal trial" without indictment by a fair and unbiased Grand Jury resulting from due process of law, appellate review must precede trial for the individual to "enjoy the full protection of" these Fifth Amendment rights. "Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' . . . before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed . . ., he has still been forced to endure a trial that the [Fifth Amendment] was designed to prohibit." *Abney v. United States, supra,* 431 U.S. at 660-662.

The "pragmatic considerations" threatening "the efficiency of the criminal justice system" cited by the Ninth Circuit in *Garner* may justify expedited treatment and summary procedures and calendars, to weed out frivolous, dilatory appeals, as *already* recognized by this Court in *Abney.*

431 U.S. at 662, n. 8. But such procedural difficulties simply cannot justify the Ninth Circuit's blanket denial of jurisdiction over all such appeals, when this result is in direct conflict with this Court's decision in *Helstoski*, and threatens the irreparable loss of Fifth Amendment protections against trial itself which the collateral order doctrine was intended to preserve. See *Abney v. United States, supra*, 431 U.S. at 660-662. Indeed, delaying review of such meritorious claims until *after* conviction only *further* impairs both speedy trial rights and the efficiency of the criminal justice system, by requiring a useless trial and appeal, and perhaps still another criminal prosecution thereafter, solely because of improprieties in the original Grand Jury proceedings. See, *e.g.*, *United States v. Basurto, supra*.

For these reasons, respondents Del E. Webb Corporation and James R. Comer support and join in the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed herein, specifically requesting the opportunity to file briefs on the merits, in support of the petitioners' position, if the Petition is granted.

Respectfully submitted,

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